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Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of) EB DOCKET NO. 03-96
)
NOS COMMUNICATIONS, INC.,) File No. EB-02-TC-119
AFFINITY NETWORK INCORPORATED)
and NOSVA LIMITED PARTNERSHIP) NAL/Acct. No. 200332170003
)
Order to Show Cause and Notice of) FRN: 0004942538
Opportunity for Hearing)

To: The Commission

ENFORCEMENT BUREAU'S REPLY
TO OPPOSITION TO MOTION TO STRIKE

1. On May 30, 2003, NOS Communications, Inc. ("NOS"), Affinity Network Incorporated ("ANI"), and NOSVA Limited Partnership ("NOSVA") (collectively, the "Companies") filed a consolidated Opposition to Motion to Strike and Reply to Opposition to Petition for Reconsideration (the "Opposition") in connection with the above-captioned proceeding. The Chief, Enforcement Bureau (the "Bureau"), by his attorneys and pursuant to section 1.45(c) of the Commission's rules,¹ hereby submits this Reply.² As the Bureau demonstrated in its May 20, 2003, Motion to Strike and Opposition to Petition for Reconsideration (the "Motion"), the Companies' Petition for Reconsideration of the Commission's *Order to Show Cause and Notice of Opportunity for Hearing* (the

¹ 47 C.F.R. 1.45.

² On June 6, 2003, the Bureau filed a Motion for Extension of Time, until June 16, 2003, within which to respond to the Companies' Opposition. Therein, the Bureau demonstrated that it had not actually received the Companies' Opposition until five days after it was filed and two days before this Reply was due. As noted in the Motion for Extension of Time, counsel for the Companies have consented to the grant of such an extension.

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“OSC/NOH”³ is unauthorized by the rules and should be dismissed without consideration by the Commission.⁴

2. In their Opposition, the Companies continue to maintain that their Petition for Reconsideration of the *OSC/NOH* was filed in accordance with Section 1.106(a)(1) of the Commission’s rules⁵ and should be considered on the merits. In addition, the Companies claim that their Petition for Reconsideration must be entertained under the precedent established in *Westel Samoa, Inc.*, 13 FCC Rcd 6342 (1998). Neither argument is valid.

3. As the Bureau demonstrated in its Motion, Section 1.106(a)(1) of the Commission’s rules provides that “[a] petition for reconsideration of an order designating a case for hearing will be entertained if, and insofar as, the petition relates to an adverse ruling with respect to petitioner’s participation in the proceeding.”⁶ The Commission has consistently enforced this provision of its rules, dismissing as unauthorized petitions for reconsideration of hearing designation orders not predicated on an adverse ruling relating to

³ 18 FCC Rcd 6950 (2003).

⁴ The Companies’ claim at page 4 of their Opposition that the Bureau’s Motion was late-filed is without merit. According to the Certificate of Service appended to the Petition for Reconsideration to which the Bureau’s Motion responded, the Companies served the pleading via mail on at least one party to the proceeding. Consequently, *all* parties, including the Bureau, were entitled to avail themselves of the additional time allowed for pleadings filed by mail for interposing their respective responses. See 47 C.F.R. § 1.4(h). The Commission amended the rule to provide for uniform filing deadlines in cases in which, as here, one party among several is served via mail. The stated purpose of the amendment was to avoid the “possibility that some parties in multi-party litigation may be required to file their pleadings before others, giving others an opportunity to ‘preview’ their arguments before filing their own pleading.” *Amendment of Section 1.4 of the Commission’s Rules Relating to Computation of Time*, 11 FCC Rcd 3059, ¶ 5 (1996). In light of the fact that the party that received the Petition by mail is counsel of record in the subject hearing for both the principals of the Companies and for two of the Companies themselves, the potential for abuse, had the Bureau filed its response to the Petition on the earlier deadline advocated by the Companies in the Opposition, is self evident.

⁵ 47 C.F.R. 1.106(a)(1).

⁶ *Id.*

the petitioner's participation in the subject hearing.⁷ The Commission has steadfastly done so "to ensure the orderly conduct of hearings and to prevent the disruption and delay that would be caused by routinely entertaining requests for interlocutory relief."⁸

4. The Companies claim in their Opposition, as they did in their Petition for Reconsideration, that, because the *OSC/NOH* failed to name them as parties in the captioned proceeding, they are collectively the subject of an adverse ruling as to their participation therein and entitled under Section 1.106(a)(1) to seek reconsideration of the *OSC/NOH*.⁹ Predicated solely upon this unfounded contention, the Companies further maintain that they are entitled to challenge *all* aspects of the *OSC/NOH*, as well as the Commission's authority to designate issues against them and ultimately to sanction them for their apparent misconduct. Such procedural bootstrapping should not be tolerated.¹⁰

5. As the Bureau noted in its Motion, the Companies' claim that they were barred by the *OSC/NOH* from participating in this proceeding is belied by their May 7, 2003, submission of notices of appearance in the subject hearing proceeding. On May 21, the

⁷ See, e.g., *Family Broadcasting, Inc.*, 16 FCC Rcd 12801 (2001); *James A. Kay, Jr.*, 13 FCC Rcd 16369 (1998); *James A. Kay, Jr.*, 11 FCC Rcd 5324 (1996); *James A. Kay, Jr.*, 11 FCC Rcd 5324 (1996); *Trinity Broadcasting of Florida, Inc.*, 9 FCC Rcd 2567 (1994); *Coast TV, et al.*, 5 FCC Rcd 2751 (1990).

⁸ See *James A. Kay, Jr.*, 13 FCC Rcd 16369 (1998); see also, *ITC World Communications, Inc.*, 86 FCC 2d 31, ¶ 4 (CCB, 1981).

⁹ Opposition at p. 2.

¹⁰ As the Bureau demonstrated in its Motion, the Companies' Petition for Reconsideration is barred as a factual matter by Section 1.106(a)(1). Because the *OSC/NOH* named the Companies as parties to this proceeding, it contained no adverse ruling as to the participation of the Companies. The Bureau observed in its Motion that the names of the Companies appear prominently in the caption at page 1 of the *OSC/NOH*; footnote 1 of the *OSC/NOH* defines the term "NOS/ANI," used throughout the document, to include each of the Companies; the Companies and the activities in which they engaged are described and discussed extensively at paragraphs 3-23 of the document; each of the three hearing issues designated at paragraph 27 relates to and directly implicates the Companies; and the ordering clause at paragraph 29 directing the parties to file notices of appearance explicitly notifies the Companies that, if the Companies fail to file a written appearance within the time specified, they will forfeit their right to a hearing. The Companies do not dispute these facts.

Presiding Judge conducted a Prehearing Conference, during which he accepted the Companies' notices of appearance and confirmed their status as parties to the hearing. Notwithstanding the fact that the Companies were each represented at the Prehearing Conference by multiple counsel who actively participated, they continue to maintain in their Opposition that they have been prejudiced by the claimed adverse ruling in the OSC/NOH. Remarkably, the Opposition, signed by the counsel who represented the Companies at the Prehearing Conference, makes no reference to the Presiding Judge's rulings confirming the Companies' party status, memorialized by his *Order*, FCC 03M-19 (ALJ, released May 23, 2003), a copy of which is attached and of which the Commission may take official notice.

6. Thus, even assuming, *arguendo*, that there was any doubt at the time the Companies filed their Petition for Reconsideration whether the *OSC/NOH* contained an adverse ruling regarding their participation in the hearing, it was removed by the Presiding Judge's rulings, which resolved any question of whether the Companies may participate. Thus, the sole contention by which the Companies claimed the procedural right to file their Petition for Reconsideration has no basis in fact. Because Section 1.106(a)(1) provides that a petition for reconsideration of a hearing designation order will be considered *only* if it relates to an adverse ruling involving the petitioner's participation in the proceeding, and there is absolutely no question, particularly in the wake of the Presiding Judge's rulings, that the Companies now have the opportunity to so participate,¹¹ there is indisputably no basis by which the Companies may seek reconsideration of the *OSC/NOH*. Accordingly, the

¹¹ Indeed, since the release of the *OSC/NOH*, the Companies have not only filed their notices of appearances and participated in the May 21, 2003, Prehearing Conference, they also, on May 30 (by NOS) and June 6 (by ANI and NOSVA), filed motions for extension of time to respond to the Bureau's May 27, 2003, Request for Admissions of Fact and Genuineness of Documents (the "RFA") and, on June 6, the Companies filed a Joint Motion for Protective Order regarding the RFA. For this reason as well, the Companies' claim that they are being somehow prejudiced by the *OSC/NOH*'s precluding them from participation rings particularly false.

Companies' Petition for Reconsideration should be dismissed.

7. In apparent recognition of the fatal flaw in their argument that the *OSC/NOH* deprived them of the ability to participate in the hearing, the Companies abruptly shift gears in their Opposition. They now contend that not only did the *OSC/NOH* contain an “adverse ruling” that failed to name them as parties,¹² the *OSC/NOH* also contained an “adverse ruling” because it made the Companies’ *principals* parties *against their wishes*.¹³ There are numerous problems with this newly minted claim: (i) it is untimely, as the Petition failed to make such an argument; (ii) the petitioners are the Companies, not their principals; and (iii) the Companies cite no precedent interpreting Section 1.106(a)(1) in the manner advocated in their Opposition (and the Bureau knows of none). Indeed, since virtually every applicant or licensee designated for hearing would consider such Commission action to be adverse, under the Companies’ reasoning, reconsideration of each such hearing designation or show cause order would be permitted under Section 1.106(a)(1), thus making a nullity of the “adverse ruling” requirement. These last-minute tactics merely highlight the utter lack of merit in the Companies’ Section 1.106(a)(1) argument.

8. The reluctance of the still unidentified principals to participate in a hearing with the stated purpose of exploring their apparent wrongdoing, although understandable, is simply not a basis for seeking reconsideration of a hearing designation order under Section 1.106(a)(1). The *OSC/NOH* made the principals of the Companies parties in the captioned proceeding to provide them an opportunity to participate and present evidence on the issues designated against them. If the principals do not wish to so participate at the hearing, they

¹² Petition, at pp. 1-2.

¹³ Petition, at pp. i, 2.

are entitled to waive their hearing rights and submit to the procedures set forth in Section 1.92 of the Commission's rules.¹⁴ In no event, however, does their apparent tactical decision allow for reconsideration of the *OSC/NOH*.

9. The Companies' continued reliance on the *Westel Samoa, Inc.* case¹⁵ as a basis for seeking such reconsideration of the *OSC/NOH* is similarly meritless. In *Westel Samoa*, the Commission entertained a petition for reconsideration of a hearing designation order filed by an individual who was named as a party in the order, but was neither a Commission licensee, applicant, nor regulatee, questioning the Commission's jurisdiction over him. As the Bureau noted at footnote 15 to its Motion, *Westel Samoa* is an anomalous case. Even if *Westel Samoa* did create a narrow exception to Section 1.106(a)(1)'s express narrow limitation on the circumstances in which the Commission will entertain a petition for reconsideration of a hearing designation order raising jurisdictional questions -- which it did not -- the *OSC/NOH* withstands the Companies' jurisdictional claim. By virtue of their being common carriers holding Section 214 authorizations, the Companies, as Commission licensees, are subject to a panoply of Commission's rules, regulations and processes. In addition, their respective principals -- who control the Companies, are involved in the day-to-day management of the Companies and are responsible for ensuring that the Companies operate in compliance with those same Commission rules, regulations, and processes -- also are subject to Commission scrutiny when the basic qualifications of the entities that they run are called into serious question.¹⁶ Because of the apparent prominence of the Companies'

¹⁴ 47 C.F.R. ¶ 1.92.

¹⁵ 12 FCC Rcd 14057 (1997).

¹⁶ See, e.g., *MobileMedia Corporation*, WT Docket No. 97-115 (released May 5, 1997) (conduct of licensee's principals and others is relevant in determining qualifications).

principals in the subject misconduct, in order to protect the public from further abuses, the Commission designated an issue contemplating issuance of a cease and desist order against the principals as well as the Companies.¹⁷ The only similarity between *Westel Samoa* and the instant case is that both the petitioner in *Westel Samoa* and the Companies here *claim* that the Commission lacks jurisdiction over them to commence a revocation or show cause hearing. In *Westel Samoa*, the Commission held that it had jurisdiction over the petitioner. For the foregoing reasons, the Commission also has jurisdiction over the Companies with regard to their common carrier operations. As the Bureau demonstrated in its Motion, the Commission clearly has plenary authority to revoke a Section 214 authorization if information brought to its attention confirms that the regulated entity lacks the basic qualifications to remain a Commission licensee. That is precisely the issue here.

10. The Companies devote the remainder of their Opposition to a rehash of the arguments that they advanced in their Petition for Reconsideration, which the Bureau previously refuted in its Motion. Their contention that the *OSC/NOH* contains defects “that would inevitably result in reversal of the initial decision” in this proceeding is without merit.¹⁸ Should the Companies wish to pursue their claims, under the rules, they may do so if and when they file exceptions to the Presiding Judge’s initial decision in this proceeding.¹⁹

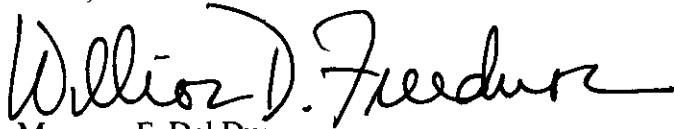
¹⁷ *OSC/NOH*, 18 FCC Rcd at 6965.

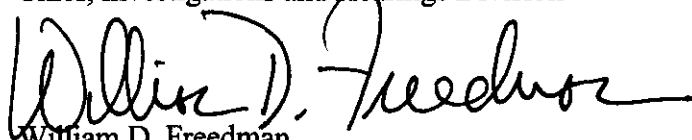
¹⁸ See *James A. Kay, Jr.*, 13 FCC Rcd 16,369 (1998), citing, *Southern Broadcasting Co.*, 40 FCC 2d 1109, 1113 ¶ 10 (1973); *Communications Satellite Corp.*, 32 FCC 2d at 534 ¶ 4.

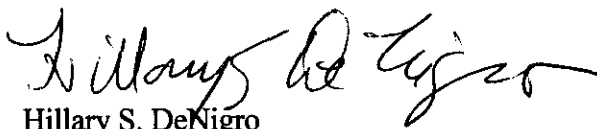
¹⁹ See *James A. Kay, Jr.*, 14 FCC Rcd 1291 (1998).


Their effort to pursue a substantive ruling on their claims under the guise of a Petition for Reconsideration of the *OSC/NOH* should not be countenanced.

Respectfully submitted,
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Chief, Enforcement Bureau

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June 16, 2003

**Before the
Federal Communications Commission FCC 03M-19
Washington, D.C. 20554 02278**

In the Matter of)	EB Docket No. 03-96
)	
NOS Communications, Inc.,)	File No. EB-02-TC-119
Affinity Network Incorporated and)	
NOSVA Limited Partnership)	NAL/Acct. No. 200332170003
)	
Order to Show Cause and)	FRN: 0004942538
Notice of Opportunity for Hearing)	

ORDER

Issued: May 21, 2003 ; Released: May 23, 2003

This will confirm certain rulings made during the course of the May 21, 2003, prehearing conference in this proceeding. The reasons for the rulings were stated on the record and are incorporated by reference.

Accordingly, IT IS ORDERED that the Notice of Appearance, or in the Alternative, Petition to Intervene, filed on May 7, 2003, by NOS Communications, Inc., IS GRANTED, that NOS Communications, Inc., IS MADE a party to this proceeding, and that its Notice of Appearance IS ACCEPTED.

IT IS FURTHER ORDERED that the Notice of Appearance, or in the Alternative, Petition for Leave to Intervene, filed on May 7, 2003, by Affinity Network, Inc., and NOSVA Limited Partnership, IS GRANTED, that Affinity Network, Inc., and NOSVA Limited Partnership ARE MADE parties to this proceeding, and that their Notice of Appearance IS ACCEPTED.

IT IS FURTHER ORDERED that the following procedural schedule IS ESTABLISHED for the hearing in this proceeding:

September 26, 2003	Completion of all discovery. ¹
October 14, 2003	Exchange of direct case exhibits, ² stipulations, and a list of witnesses, if any, to be called for oral testimony. ³

¹ Courtesy copies of all discovery requests and responses (including letters) shall be served on the Presiding Judge. However, documents produced pursuant to requests for the production of documents should not be provided.

² It will conduce to the orderly dispatch of the Commission's business and contribute significantly to the disposition of this proceeding to have all or substantially all of the direct case exhibits reduced to writing, and the parties are strongly encouraged to do so. Cf. Section 1.248(d) of the Commission's Rules.

³ All exhibits and witness lists must be received by all parties and the Presiding Judge not later than this date. The exhibits should be serially numbered, separately paginated, and assembled in a binder with a tab on each document. A prefix should be used to indicate the party sponsoring the exhibit (e.g., NOS Ex. 1;

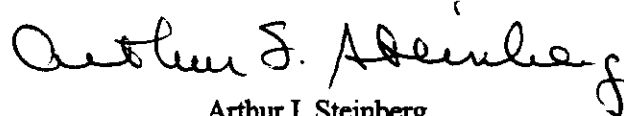
October 21, 2003

Notification of witnesses desired for cross-examination.⁴

November 12, 2003

Commencement of the hearing at 9:00 a.m. in the Commission's Washington, D.C., offices.⁵

FEDERAL COMMUNICATIONS COMMISSION


Arthur I. Steinberg
Administrative Law Judge

EB Ex. 1). If official notice is requested of any materials, they should be assembled in written form, properly identified by source, given an exhibit number, and exchanged on the date set. An index containing a descriptive title of each exhibit, the number of pages contained in each exhibit, and the identification of the sponsoring witness(es) of each exhibit should be included.

⁴ Such notification may be made by telephone, facsimile, or e-mail. If oral notification is given, it must be confirmed in writing.

⁵ A procedural schedule for rebuttal, if any, will be established at the conclusion of the direct case.

CERTIFICATE OF SERVICE

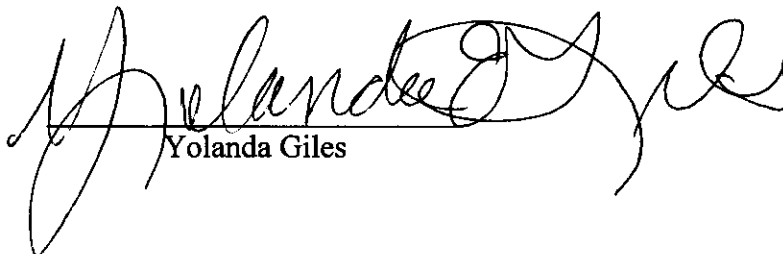
Yolanda Giles, a secretary of the Enforcement Bureau's Investigations and Hearings Division, certifies that she has, on this 16th day of June, 2003, sent by first class United States mail copies of the foregoing "Enforcement Bureau's Reply to Opposition to Motion to Strike" to:

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* Hand Delivered